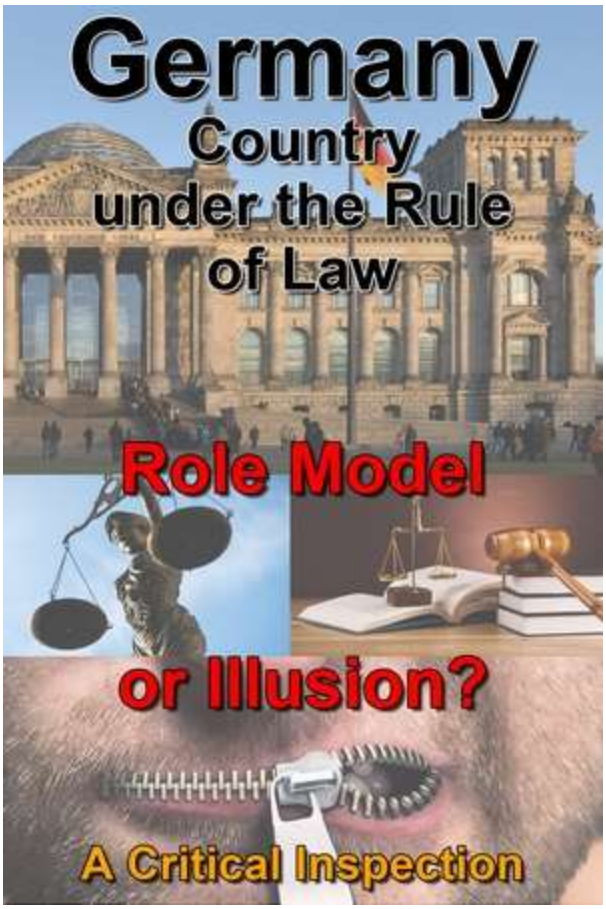
Germany, Country under the Rule of Law: Role Model or Illusion?

A Critical Inspection

Germar Rudolf

Abstract



In the whole world, the Federal Republic of Germany enjoys the reputation of being a liberal, democratic country under the rule of law. This self-portrait will not be simply adopted here, however, but it will be critically reviewed. The litmus test for a country under the rule of law is when the state's interests collide with those of its citizens, that is to say, when the state finds it expedient to prosecute and punish its citizens. Then it will show whether the law can prevent the authorities from misusing their omnipotence against defenseless citizens. Crucial in this regard is the Code of Criminal Procedure. It defines the rules according to which the judiciary may deal with those in the courtroom who got into the government's crosshairs for whatever reasons. Good laws prevent the state's misusing its power in the courtroom. In this regard, however, Germany performs abominably, because its Code of Criminal Procedure gives judges all the instruments needed to deal with defendants which ever way they (or their masters) please. They can gag the defense, deny all their motions for evidence, prevent any appeal, hide from the public what a case is all about, and they can claim anything they want in a verdict,

because no protocol is made recording what is said in the courtroom by any party. Hence, if push comes to shove, the German judiciary can do arbitrarily whatever they (or their masters) want. And that is exactly what they do. But see for yourself.

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Germany, Country under the Rule of Law: Role Model or Illusion?
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Transcript

The Federal Republic of Germany enjoys a worldwide reputation as a functioning, well organized country under the rule of law that protects freedom and democracy. The Germans themselves have a reputation for organizing all kinds of things well, and the quality of German products is universally recognized.

When it comes to freedom and democracy, however, the historical record of the Germans is not quite so favorable, despite the insistence of the rulers of today's German state that the record has changed profoundly in the time since the end of World War II.

And how about the rule of law in that country? The independence and non-partisanship of the judiciary in Germany is older than the liberal democracy. It goes back to Frederick the Great, who made the king himself subject to the law in Prussia. He thereby introduced a principle that set a new standard for the whole of Germany. Frederick the Great once described this principle of the independence and nonpartisanship of the judiciary as follows:[1]

"You need to know that the least of peasants, and what is even more, the beggar is just as much a human being as is his majesty, and he has to find justice by the fact that all humans are equal before the law; it may be a prince suing a peasant or vice versa, then the prince will be equal to the peasant before the law; and in such affairs, it has to proceed purely by justice with no regard to the person. The justice councils in all provinces have to only comply with this. And wherever they do not go straight forward with justice without regard to person or class and put aside natural justness, they shall get in trouble with his royal majesty. A legal council which exercises injustices is more dangerous and worse than a gang of thieves; one can protect oneself against those, but nobody can protect himself against rogues

who use the robes of justice to carry out their vicious passions; they are worse than the biggest scoundrels in the world and deserve double punishment."

The image of the German judiciary in the eyes of its own constituents is best gauged by the respect with which the highest court in Germany is regarded: the Federal Constitutional Court. Surveys have shown that for decades the Federal Constitutional Court, see the red bars, has been able to maintain a reasonably consistent lead over the other branches of the government—the German parliament called the *Bundestag*, and the executive branch. Among the Germans, it is exceeded in prestige only by that enjoyed by the president; see the green bars.[2] The great prestige of the Federal Constitutional Court even inspired a special study by German scholars, from which the previously shown chart was taken.[3]

The German justice system also enjoys a stellar reputation internationally. For example, a decision by a U.S. federal court that denied the application for asylum in the United States, filed by a German, noted that Germany has a "highly developed and sophisticated legal system," from which no unjust persecution could emerge.[4]

The lofty reputation of the German justice system, together with economic prosperity and political freedoms has led to Germany's becoming a magnet for political as well as economic refugees ever since the 1960s.

In this connection, an asylum case is of interest that was mentioned in an article by Ingo Müller in the German journal *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (*Critical Quarterly of Legislation and Jurisprudence*). It had to do with the Turkish defense lawyer Şerafettin Kaya, here a more recent portrait of him, who in the early 1980s fled to Germany and there sought asylum from persecution by Turkish military tribunals. In his application for asylum, Kaya portrayed the Turkish military criminal law as unmistakably repressive, meaning that trials conducted by it automatically ought to be considered persecutorial in nature. The German federal agency for the recognition of foreign refugees nonetheless denied Kaya asylum in 1982 with the following justification, quote:[5]

"The Agency is in possession of an affidavit of the Max Planck Institute, that contains among other things a comprehensive comparison of the Turkish Code of Military Criminal Procedure with the German Code of Criminal Procedure. This comparison reflects a general congruence and even at points a more-liberal stance of the Turkish Code of Military Criminal Procedure …"

Turkey at the time was unequivocally a repressive military dictatorship, not a modern liberal-democratic country under the rule of law.

The German Code of Criminal Procedure prescribes how criminal proceedings are to be conducted. As such, it is one of the most-important legal guidelines of the German justice system. What, then, might one make of the fact that German legal scholars, represented by researchers of a Max Planck Institute, in agreement with an agency of the German federal government, reported in the early 1980s that this legal guideline is at points less-liberal than that of a regime that ranks as a thoroughly repressive military dictatorship? That would seem to say that the German Code of Criminal Procedure of that time, formally speaking, permitted a more-repressive administration of justice than the Turkish Code of Military Criminal Procedure. Well, great!

I will return to this article by Ingo Müller again later.

Some aspects of the German judicial system are discussed in the following. They will not be compared with the irrelevant laws of a military dictatorship, but rather with those western ideals that the Federal Republic of Germany boasts of far and wide on its banners when it proclaims itself to be a country under the rule of law.

To start with, we will consider who may introduce evidence in German criminal trials. According to Section 214 of the German Code of Criminal Procedure, witnesses are summoned by the judge or by the district attorney, and evidence of other kinds is usually introduced by the district attorney, although the judge also has the power to do so.

Section 245 of the German Code of Criminal Procedure says in Clause 1:

"The taking of evidence shall be extended to all witnesses and experts who were summoned ***by the court*** *and who appeared, as well as to the other evidence produced* ***by the court or the public prosecution office*** *pursuant to Section 214 subsection (4),* […]*"*

Do you notice anything? There's no mention of the defense. The version of this paragraph in effect until 1975**[6]** read to the contrary as follows:

"The taking of evidence shall be extended ***to all*** *witnesses and experts who were summoned and who appeared, as well as to the other evidence produced* […]*"*

Where previously the defense could force the introduction of evidence when this evidence had already been "produced," that is, was present in the courtroom, since then the defense must first file a motion to introduce anything they wish to introduce, as stated in the new Clause 2 of this paragraph. The court can, however, deny these motions on a plethora of grounds. This list has likewise been greatly expanded vis-à-vis the version of 1975, which contained only the first two items (italicized):

- *if the evidence is inadmissible,*
- *if the application has been filed for the purpose of protracting the proceedings,*
- if the fact for which evidence is to be furnished has already been proved,
- if taking the evidence is superfluous due to common knowledge,
- if there is no connection between the fact and the matter being adjudicated, and
- if the evidence is completely unsuitable.

I won't elaborate here on each and every point, but will rather concentrate on two grounds of denial in this list, in which one can see what traps the state has set.

Any introduction of evidence is inadmissible where it is in any way contrary to law. This becomes problematic when case law has declared it a crime in certain cases to merely make certain *claims* about what a certain piece of evidence is supposed to prove. This condition was reached in Germany in the mid-1990s. I will get back to that later.

The common-knowledge formula appears already in Section 244 of the German Code of Criminal Procedure. It comprehensively covers the taking of evidence, therefore, among other things, also evidence that is not yet present in the courtroom, and so must first be procured. The list of possible

grounds for denial is here still longer. Among other things, this paragraph also empowers the court to totally bar the procurement, that is to say, the acquisition of evidence when the court avers already to know the truth of the matter, no matter whether this truth is in accordance with the claims made by a motion or not. In Galileo Galilei's time, for example, it was common knowledge that the sun rotated around the earth. Under the application of a similar juridical logic the Inquisition forbade the accused to prove the contrary, since the court pretended to know what was true. Thus, Giordano Bruno ended up burning at the stake, and Galileo in lifelong house arrest.

Section 245 of the German Code of Criminal Procedure limits this absolute judicial power to declare what is true by declaring something to be common knowledge. It stipulates that a piece of evidence already present in the courtroom can be rejected on grounds of common knowledge only, if the claim to be proven is evidently *true*. Hence, the court needs to acknowledge that claims made in a motion about the evidence are true. However, this has not deterred German judges from barring such evidence anyway, when in a legal fix, by determining the claims about the evidence to be manifestly *false*. More on this later.

The gross imbalance of power between defense and prosecution in the admissibility of evidence, by the way, violates the spirit of the European Convention on Human Rights, in which in Clause 3 of Article 6 it is stated that every defendant is to be guaranteed the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." Oddly, the convention speaks only of witnesses, as though there were no other kinds of evidence.

Now we come to another subject, the ways and means by which German judges deal with evidence. Section 261 of the German Code of Criminal Procedure says:

"The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole."

Therefore, according to German criminal-justice law only the judges who have conducted a criminal trial are empowered at their discretion to interpret the proffered evidence, and based thereon, to pronounce a verdict. Thereby, they are constrained by absolutely nothing—neither by logic nor by truthfulness nor by honesty. In other words: this is a blank check for German judges to err with no correction and to lie and swindle with impunity.

This might sound harsh. The fact is, however, that precisely because of this logic, no sort of verbatim transcript is taken in German courtrooms. This is even the case where the content of the introduction of evidence is at least recorded in summary, such as during criminal trials before County Courts, as prescribed by Section 273, Clause 2 of the German Code of Criminal Procedure. The criminal court judge therein named and the court with lay judges are institutions of the County Court.

However, absolutely no evidentiary value inheres in these summary transcripts as concerns the content of the argument. Section 274 of the German Code of Criminal Procedure provides that the evidentiary import of the transcript is strictly limited to the recorded formalities—at least the legal scholars interpret this legalese in such a way. So, when the transcript covering the proceedings before the County Court states that Witness X testified on day Y and stated that he saw a red car speed around the corner, the evidentiary content extends only to the fact that the witness testified on that day, but not

what he actually said. When the judges then write in the verdict that the witness said he saw a green truck sitting by the side of the road, the judges are right and not the transcript, and that's that!

And if you're not entirely convinced, just look it up in Wikipedia.[7]

We must, unfortunately, read a couple more sections of that law to understand what really goes on in German courts. I beg a little patience for this.

In Germany, as mentioned, only a brief summarizing transcript of content is made in the County Courts. And why? Well, the reason for this brief summary lies in the fact that one can file for an appeal on the facts of the case against the verdict of a County Court. If the appeal is granted, the court of the second instance must take all evidence anew. See Section 328 of the German Code of Criminal Procedure. In order that the judges can shorten the proceedings in the second instance, they can consult the transcript of the County Court for what happened in the court of first instance. That can save them work.

Interestingly, one cannot file for an appeal on the facts of the case against the verdict of the first instance, if that verdict was handed down by a criminal division of a District Court or a Higher Regional Court. One may only apply for a so-called *revision* of these verdicts. A *revision* concerns only matters of law, meaning that one may only claim that some formalities were disregarded or that some other law was violated. It is not permitted to contest anything about the matters of fact, that is, about the factual findings stated in the verdict. Because strictly legally speaking it is therefore totally irrelevant what transpired before the District Court, these courts merely produce a record of formalities as set forth in the first clause of Section 273 of the German Code of Criminal Procedure. In such a protocol of formalities, one might for example read that Witness X testified on day Y, but no trace whatever will be found as to what was testified.

Judicial absolutism reigns also as to the interpretation of documents and material evidence. If in the taking of evidence a document is introduced that clearly proves Fact A, yet the court writes in the verdict that the document *refutes* Fact A, then the court is right. It has final disposition in the interpretation of the evidence produced. In the case of a verdict of a District Court, there is no possibility whatever of contestation.

Until the revision of 1965, the German Code of Criminal Procedure still made it the duty of all courts to record at least "[t]he main outcome of examinations at the main hearing."[8] But since no appeal on the facts of the verdicts of German District Courts is possible in any case, the revision of 1975 relieved them of this duty. There is some fine logic to this: since errors and lies committed by German judges of the District Court cannot be contested anyway, there's no need to even record what goes on in the courtroom. Great! This is the logic of terrorism!

For criminal trials that are first conducted at the District Court level, it's pretty much all or nothing for the defendant. He is tried there for particularly serious offenses that carry potential sentences of more than four years. Those interested may look this up in Paragraphs 24 and 74 of the German Code on Court Constitution.[9] Here, I won't annoy you any further with this welter of legal verbiage. It would be important precisely in these cases where no possibility of appeal exists, that the judges, in their own interest, get the facts right at this first and only time. But how can this be done without a verbatim transcript?

This absolute prerogative in the absence of a verbatim transcript has led to repeated harsh criticism. One of the most-prominent critics is the former defense attorney Rolf Bossi, who described and criticized this egregious defect in German criminal procedure in his book *Halbgötter in Schwarz* (*Demigods in Black*). Here is a description of this problem that was broadcast by the German TV channel 3Sat on the occasion of the release of Bossi's book in 2005:

"A defense lawyer indicts. Star defender Rolf Bossi aims serious charges against the German judiciary. The unaccountability of judges, impunity and scandalous, wrong judgments render the rule of law in Germany a fiction, writes Bossi in his provocative book 'Demigods in Black.' Today, anyone could fall victim to a ruling that is utterly immune to effective oversight. 'There is no requirement for verbatim transcripts for Penal Chambers of District Courts and even worse, for Jury Courts. There the judge can do whatever he likes. As a defense lawyer, I have no possibility of objection between the revelations of the investigation, the taking of evidence, and whatever he writes in his verdict. And I have no appeal.' Thus, any judge can hide behind a mere authoritative-sounding verdict with no fear of correction. Today, even many judges agree that there is too little effective oversight in the German judicial system. 'Bossi's book comes at the right time. Whether intentionally or not, he has good timing, as the justice minister's conference is in fact looking at a major structural reform.'"

Since then, the German Code of Criminal Procedure has been revised several times, but in this regard, nothing has happened. Quite the contrary. Because some defense attorneys challenged the omnipotence of German judges and filed uncomfortable motions to introduce evidence, a section was slipped in in 1994 that empowers the court to gag the defense attorneys as they see fit—with the exception of the closing argument. Here is the text of the scandalous Section 257a:**[10]**

"The court may require participants in the proceedings to file applications and proposals regarding questions of procedure in written form."

Since this applies to all parties to the proceeding, this sounds nicely neutral, but in fact this section is aimed exclusively at defense attorneys in order to gag them. Therewith, the right to a public hearing guaranteed as a civil right is undermined, since once a judge has denied the defense its voice, the public thereafter may learn only whatever the prosecutors and the judge happen to mention. Further, one may confidently assume that many motions that in the course of argument often arise spontaneously and are therefore rendered orally, by effect of this ruling of the judge, are never made.

Section 249 of the German Code of Criminal Procedure is of similar import. It allows the judge to stipulate that documents entered into evidence may not be read out in public. Instead, parties to the trial must read them in private. That is, they must take the documents home with them and read them in seclusion—or they must at least certify on the day designated for this that they have read them. Whether they really have, is not verified.

In extreme cases where all the evidence is in documents that must be read in seclusion, this means that the public finds out absolutely nothing about the content of any evidence. This also makes a mockery of the principle of public hearings.

Of both of these muzzling provisions, Dr. Dr. Uwe Scheffler, Professor of Criminal Justice at the Europa University in Frankfurt on the Oder wrote:

"According to this rule [Section 257a], *the court can now deprive the parties to the trial of their voices and confine them to written form. How convenient: Since earlier laws had already provided for the option to read out documents by not reading them out, that is, by giving the parties to the action the opportunity to 'become familiar' with the text of the documents in quiet seclusion, this means that one can now maintain the silence of the grave in the courtroom. In addition to frequently voiced criticisms, the following may be pointed out: the legislature has clearly stated that this new regulation 'streamlines' the trial. Because writing and reading what was written takes longer than an oral argument, this means that the legislature downright aims at dispensing with the right to a legal hearing."*

There are many further modifications to the procedural law that are detrimental to defendants. I can't explore them all here. A list of some of the sections in question can be found in Footnote 5 of Rainer Hamm's article on the "Evidence as a Legal Concept and Its Scrutiny during Legal Revisions" ("Beweis als Rechtsbegriff und seine revisionsrechtliche Kontrolle") that can be found in the *Festschrift für Gerhard Fezer* cited here.**[11]** If you are interested in further details of the historical development of the Code of Criminal Procedure in the Federal Republic of Germany, I recommend reading the previously mentioned article by Ingo Müller. He describes therein how salutary departures were undertaken after the Second World War to make the German Code of Criminal Procedure more liberal after it had been decimated to the detriment of defendants under National Socialism. A countermovement developed in the 1970s, however, in response to the terrorism of the Red Army Faction in which all the liberal reforms were reversed. Thereafter followed wave after wave of "deliberalization," so that one can now rightly say that today the German Code of Criminal Procedure is more-repressive than it was under National Socialism.

Indeed, the historical origin of the German Code of Criminal Procedure is anything but liberal. It was created in 1877, that is, during the time of the Second German Empire. That could explain why it includes no verbatim transcript requirement, although other countries at the time already had verbatim transcript requirements. It must have been a major undertaking at the time to complete a verbatim transcript of what was said in the courtroom. For that, stenographers were needed and then typists. There is today, however, no excuse anymore not to maintain verbatim transcripts in police interrogation rooms and in courtrooms. In this age of the supercomputers, automatic voice-recognition software is employed by default: in the courtrooms of most other countries of the world, in the mass media, in medicine, etc.

What has been common practice in most western countries for centuries, isn't even discussed in Germany. The plans in the works for a general overhaul of the German Code of Criminal Procedure foresees no such change. All that is new, is that the police and the courts are allowed to video-record certain witness interrogations. No requirement for the creation of verbatim transcripts of what transpires in interrogation rooms or courtrooms, nor even the possibility of such as evidence for appeals and *revisions* is in prospect.

In a contribution to the Petersberg Days of the Criminal Law Study Group of the German Bar Association, Prof. Dr. Werner Leitner noted:**[12]**

"The German criminal justice system still has […] *medieval tendencies and shields itself, without really sound arguments, from adaptation to present-day technical and pertinent conditions."*

Just as little is it planned to impose definite limits on the totalitarian power of judges to evaluate evidence, such as that one would require that the evaluation be logical and be internally free of

contradiction and with regard to the evidence. But without a verbatim transcript, the logical conclusiveness would be hard to determine, and any contradiction to witness testimony could never be even considered.

For this reason, the impending reform of the German Code of Criminal Procedure was correctly called a "missed opportunity" in an article in the *Kriminalpolitisch Zeitschrift* (*Journal of Criminal Justice*).[13]

Whether one considers the Turkish military dictatorship, Stalin's Soviet Union or today's Federal Republic of Germany: for fraudsters, thieves, thugs, extortionists and murderers things went and still today go little differently, and most people have little sympathy for such miscreants anyway.

So, let us focus on those innocents who get caught up in the wheels of the justice system. One of the functions of a legal system should be to prevent judges from making avoidable mistakes and errors which are detrimental to the innocent.

It is even much more-important, however, to prevent the misuse of the justice system to suppress the civil rights of individuals or groups. The first mark of the quality of a justice system appears when it affords to defendants adequate protection even in such cases where the taboos of a society are touched in any way. It is then that an unspoken prejudice reigns among practically all members of a society to regard certain views as evil and punishable, no matter how peaceable such views might be.

Unfortunately, Germany has a long history of persecuting dissidents by means of the criminal justice system. It reaches back long before the National Socialist period.

Section 100 of the Prussian Criminal Law Code of 1794 can serve here as the earliest forerunner. It threatened with four- to six-month prison terms those who in sermons or public speeches called out for hatred or ill feeling against any religion.[14] This section, which was considerably more-specific and gentler than all the laws that were to follow, reflected the tolerance of religion reigning in Prussia. Far more-repressive was Section 17 of a Prussian decree of 1849 that followed the suppressed revolution of 1848. It threatened with fines or prison terms of four weeks to two years those who—quote:[15]

"sought to disturb the public peace by publicly inciting citizens of the state to hate or disdain one another."

In the eyes of the rulers, this step had become necessary because the 1848 revolution made it impossible to maintain pre-emptive government censorship. The new paragraph slipped censorship back in through the back door by motivating citizens to censor themselves in order to avoid punishment. This kind of censorship after the fact is considerably subtler and therefore less vulnerable to attack.

Two years later, in 1851, this paragraph resurrected in slightly reworded form the old Section 100 of the Prussian criminal code and so became the direct forerunner of today's Section 130 – "Incitement of the People."[16] Its first version, Section 130 of the Reich Criminal Code, in effect since 1872, forbade only class incitement, however, meaning the "class-warfare propaganda" disseminated by communists, socialists and social democrats. To-wit:

"Whosoever in such a manner as to endanger public order publicly incites different classes of the populace to take violent action against each other will be punished with fine […] *or imprisonment up to two years."*

This paragraph remained essentially unchanged until 1960, but nothing that was prosecuted in Prussia and thereafter in the German Empire is today viewed as agitation and prosecuted. National Socialism, which set the abolition of classes and the formation of an ethnic community as its resplendent goal, replaced the concept of class warfare by that of incitement of the populace, which worked primarily against those who agitated against the state, its political stance, its organs and its officeholders. It was therefore simply a shield for the state against criticism of its citizens, a classic inversion of human rights.[17] The Nazis also reinstituted the preventive censorship abandoned in 1848, so that they had a comprehensive set of legal instruments to control public opinion, of which they are known to have made vigorous use.

The class-warfare section was not modified into its present form of "agitation of the populace" until the criminal-law revision of 1960, replacing the agitation against classes with that against parts of the population. This emendation was inspired by Swastika graffiti and other anti-Jewish actions that later were revealed to have been perpetrated by east-bloc secret-service agents in an effort to tarnish the reputation of the West German Federal Republic. Since 1960, the new paragraph read:

"Whosoever, in a manner capable of disturbing the public peace, assaults the human dignity of others by inciting hatred against segments of the population, by calling for violent or arbitrary measures against them, or by insulting, maliciously maligning or defaming them, shall be liable to imprisonment for no less than three months."

Since then, this paragraph has been extended repeatedly and now has seven clauses, covers more than one page, and places pretty much all domains of opinion under penalty that are suspect to those in power.

This chart shows how the scope of this gagging paragraph has grown over the years to the present time.[18]

If the old class-warfare section was aimed at left-leaning views, the new incitement-of-the-populace paragraph is aimed at right-leaning views. It is a sort of hysterical overreaction of the German elites to the excesses of National Socialism.

No matter who in Germany is or was the target of state coercion of opinion, German judges were and are always compliant with the regime's prosecution agenda. As Bossi explained correctly in his book, the legally enforced coercion of opinion engaged in by the Nazis had no disadvantages for the German judiciary. No Nazi judge was ever prosecuted for his verdicts against dissenters. Even today the judges merely shrug, because all they're doing is applying the law. Legislation itself bears on them exactly as little as it is possible for them to reject prevailing law as illegal.

But wait. There is one exception. The judges of the German Federal Constitutional Court can indeed declare applicable law unconstitutional and thereby null and void it. And there is the catch.

In a comparison of the highest courts of the USA and the Federal Republic of Germany, a study by the Boston College International & Comparative Law Review came to the conclusion that one weakness of the German legal system lay precisely here. While in the USA every federal court can review the constitutionality of a law passed by the government, and in case of a conflict can declare the law unconstitutional and void, German county, district and superior district courts don't even have the authority to voice an opinion on that. They must rather blindly apply applicable law. Only when a case

has made its way through all instances and has finally arrived at the Federal Constitutional Court, can the question of constitutionality be addressed.[19]

The judges of the German Federal Constitutional Court are appointed by the German parliament, the Bundestag. This usually happens as follows: the established parties agree in advance upon who has when the right to nominate a candidate from among one's party's partisans. This horse trading obviously makes a bad joke of the concept of separation of powers. What can be expected in a case of unconstitutionality from a court so filled with the hand-picked appointees of the ruling elites?

When in 2009 a case had to be decided whether passages of Section 130 of the German Penal Code violated the constitutional guarantee of freedom of expression, the decision of this court was revealing. I quote:[20]

"In general, restrictions to the freedom of opinion are permissible only on the basis of general laws according to art. 5, para. 2, alternative 1, Basic Law. A law restricting opinions is an inadmissible special law, if it is not formulated in a sufficiently open way and is directed right from the start only against certain convictions, attitudes, or ideologies. […] *Although the regulation of art. 130, para. 4, German Penal Code is not a general law* […] *even as a non-general law it is still compatible with art. 5, para. 1 and 2, Basic Law, as an exception. In view of the injustice and the terror caused by the National Socialist regime, an exception to the prohibition of special laws* […] *is immanent."*

In other words: exceptions are forbidden, except in cases of exceptions. In this case, the logic of this exception is as follows:

Because in the past Germany burnt books and persecuted and imprisoned peaceful dissidents in violation of the Weimar Constitution,

Germany is now morally obligated to burn books and persecute and imprison peaceful dissidents in violation of the Bonn Constitution.

The fact is that, since its initial enacting in 1849, Section 130 of the German Penal Code has been directed "from the outset only against certain convictions, attitudes or ideologies" and has not lost this attribute to this day. It is thus clearly unconstitutional from beginning to end.

No system of justice in the world needs penal laws that forbid specific expressions of opinion. If anyone misuses freedom of speech to incite the violation of human and civil rights of third parties, then in all justice systems this is already covered by the prohibition of abetting (Section 26 German Criminal Code) or public incitement to crimes (Section 111 German Criminal Code). Only such laws deserve the description of a "general law." Every additional censorship law is nothing more than the product of tyranny, to which every German has the right and the duty according to Article 20 Clause 4 of the Basic Law to resist, so long as the Federal Constitutional Court denies any relief.

In the originally planned foreword to his book *Animal Farm*, which was rejected by four publishers among other reasons for pressure applied by the British government, George Orwell expressed it thus:[21]

"If liberty means anything at all, it means the right to tell people what they do not want to hear."

As previously mentioned, the quality of a system of justice is shown by whether the groups of the population whose views the powerful wish to suppress are protected from persecution by the state. This applies mostly to those persons who break the central taboos of a society or undermine its founding myths, that is, those whose criticism goes against the foundations of a society. As long as these views are peaceful, that is, do not advocate the violation of the rights of third parties or justify this, the justice system should not punish such publicly expressed viewpoints.

What then are the central taboos and the founding myths of today's German society?

In 1999, then German Foreign Minister Joschka Fischer put it this way:**[22]**

"All democracies have a base, a foundation. For France this is 1789. For the USA it is the Declaration of Independence. For Spain it is the Civil War. Well, for Germany it is Auschwitz. It can only be Auschwitz. In my eyes, the remembrance of Auschwitz, the 'never again Auschwitz,' can be the sole foundation of the new Berlin Republic."

I could name a long list of personalities and media voices that express what they think of anyone who attacks that foundation. I will spare us that list because everyone knows what the overwhelming majority of the populace in Germany and elsewhere thinks of those who are said to deny Auschwitz or the Holocaust in its entirety. Many people think that such persons have the same moral standing as pedophiles. One can hardly sink lower than that.

What would you do if someone approached you and, in a peaceful and maybe even scholarly and factual way, said something about Auschwitz that you truly do not wish to hear? That is almost a mere rhetorical question in a society in which an almost monolithic consensus exists as to what must be done to any such taboo-breaking historical dissident.

But it is exactly here that the crucial question arises: how do you reconcile that with the rule of law? Can and will the German justice system protect peaceful dissidents of the historical narrative of the Third Reich from legal and social assault, or does it simply throw them to the wolves?

The hard realities of today's Germany reveal unfortunately that the German justice system is perfectly tailored to enforce political prerogatives with the force of law with no compunction whatever.

In the following I will illustrate how such a thing proceeds in specific instances.

It is especially important to condemn the ringleaders of these dissidents in order to set a warning example for all to see. These are arraigned at the District Court level for a particularly serious disturbance of the public peace. This way all possibility of an appeal is denied them, and since in such criminal trials no sort of verbatim transcript is made, the door is wide open to manipulation.

All, really without exception all motions of the defense to introduce evidence demonstrating that the defendant's historical views are well founded or even correct, are denied on the grounds of common knowledge to the contrary. Decades of precedent ruling by the German Federal Supreme Court – not to be confused with Germany's Federal Constitutional Court – even compel German courts to this stance.

If the defense has its evidence already present in the courtroom, the German Code of Criminal Procedure actually *prohibits* denying such evidence with the reason that the opposite of what the evidence is said to prove is self-evident, but the German courts do so regardless, and the Federal

Supreme Court, which should correct such violations of the law, has repeatedly allowed and confirmed this practice.[23]

Motions to introduce evidence with which the defense wishes to show per Section 244 Clause 4 of the German Code of Criminal Procedure that it possesses expert opinions which are superior to expert opinions previously submitted are likewise denied on grounds of common knowledge, although the probative value of new evidence unknown to the court cannot possibly be common knowledge. This violation of the law also receives the sanction of the Federal Supreme Court.[24]

Motions to introduce evidence that there is notable public objection to common knowledge are likewise and nonetheless barred on grounds of self-evidence.[25]

Motions to introduce evidence that the reason for the lack of any notable public objection to common knowledge is that historians fear legal repercussions and for that reason no longer express publicly what they really think, are nonetheless barred on grounds of self-evidence.[26]

Troubled by such motions by the defense in trials against historical dissidents, the German justice system went so far as to declare in the mid-1990s that filing a motion to introduce evidence is in itself already a crime, if the motion's aim is to prove that the punishable opinions of the defendant are correct. For with such an act, a defense attorney would publicly commit the very same crime in the courtroom for which his client has been indicted. These decisions, too, with which defense attorneys were sentenced merely for filing motions to introduce evidence, were approved by the Federal Supreme Court, since such motions were evidently inadmissible, because they violated standing law.[27]

One of Germany's most-brutal "hanging judges" against historical dissidents, the Mannheim Judge Ulrich Meinerzhagen, was quoted by the German left-wing newspaper *tageszeitung* as follows:[28]

"Finally, the court rejected all motions with the terse—and for some anti-fascists in the audience shocking—reason that it is completely irrelevant whether the Holocaust happened or not. Denying it is subject to punishment in Germany. And that is all that counts in court. 'Democracy must be able to handle this,' a law student lectured later in the lobby of the courthouse."

As we all know, democracy is when three foxes and a chicken decide what's for dinner—or here, that the overwhelming majority of all members of a society may prescribe under pain of punishment which opinions you may publicly express on certain historical subjects, and which you may not.

Obviously, the law student did not grasp that the rule of law was established precisely to prevent such assaults by the majority against minorities.

The denial of all motions to introduce evidence in such cases is nowhere near the end of the judicial repressive measures. Certain courageous lawyers did not accept their gagging, but instead proceeded unflinchingly in the face of threats by the legal authorities and the judges. They nevertheless kept filing motions with which they tried to defend their clients. The result was the 1994 introduction of the previously mentioned muzzling Section 257a into the German Code of Criminal Procedure, that empowered judges to require all motions except closing arguments to be submitted in writing. And that is exactly what regularly happens in such cases.

In order to avoid the appearance to the public that the defendants are being sent up for totally harmless and scientifically well-founded assertions, their writings are never read out in the courtroom, but rather are consigned to "off-site private reading" as a matter of principle.

Ever since, silence is again the civic duty in German courtrooms.

Traps shut and no grumbling!

At the end of such a show trial, in which the defense is basically completely paralyzed, comes a verdict in which the judges can write whatever they like. In the absence of a verbatim transcript hardly anything can be checked anyway. Thus, the judges build their careers, ape the lynch media, and serve the wiles of politics.

Silence is the citizen's first duty!

But at the end of the day, dear observer, you probably needn't trouble yourself. Because you could safely remain silent while they took the Holocaust deniers; for you weren't a Holocaust denier, after all. You remained silent also when they came for the Nazis; you were certainly no Nazi. When they came for the right-wingers, you still remained silent, as you were certainly no right-winger. When finally they come for you, there will be no one left who could protest.

Then enjoy the farcical German justice system!

For you will evidently be an outlaw!

Here is the text of the German Basic Law article that has directly to do with this. It says there that there shall be no censorship, but German judges take this to mean merely a *preemptive* censorship. In Clause 2, the freedom of opinion is then immediately abrogated, because if even non-general censorship laws are valid at the say of the Federal Constitutional Court, then there is no freedom of expression at all.

In 1970, a professor of public law, who at the time taught at the University of Administrative Science in Speyer, Germany, wrote the following words in an obscure *festschrift* about the right of German citizens to oppose assaults by their state upon their civil rights as enshrined in the German Basic Law:**[29]**

"Seen by daylight, every single article of the Basic Law is… nothing more than the concrete embodiment of one of these foundational principles of western constitutional statehood, so that an attack on virtually any particular article at the same time affects the principles of Art. 20 Basic Law [therefore the right of German citizens to resist]*."*

17 years later the author of these lines became the president of the German Federal Constitutional Court, and 7 years after that he was elected federal president of Germany. The complete evisceration of freedom of expression in Germany was carried out during his term of office.

Summing up, this much is clear:

1. The justice system of the Federal Republic of Germany is in some regards medieval in its structure, and on paper, its procedural law allows for a more-repressive conduct of a trial than that of the Third Reich.

2. There is in the Federal Republic of Germany effectively no separation of governmental powers.

3. Every German has the right and the moral duty to oppose such an oppressive system on German soil.

"…but nobody can protect himself against rogues who use the robes of justice to carry out their vicious passions; they are worse than the biggest scoundrels in the world and deserve double punishment."

Notes

For the official English translations of various German law books see:

- **https://www.gesetze-im-internet.de/englisch_stpo/** (procedural code)
- **https://www.gesetze-im-internet.de/englisch_stgb/** (penal code)
- **https://www.gesetze-im-internet.de/englisch_gg/** (basic law/constitution)
- **https://www.gesetze-im-internet.de/englisch_gvg** (constitution of courts)

I am grateful to Norbert Joseph Potts for translating this paper into the English language.

[1] Bruno Frank, *Friedrich der Große als Mensch im Spiegel seiner Briefe*, Deutsche Buch-Gemeinschaft, Berlin 1926, p. 99.

[2] Elisabeth Noelle-Neumann, Renate Köcher (eds.), *Allensbacher Jahrbuch der Demoskopie 1998-2002*, Munich 2002, pp. 672, 710f.

[3] Oliver Lembcke, *Über das Ansehen des Bundesverfassungsgerichts: Ansichten und Meinungen in der Öffentlichkeit 1951- 2001*, Berliner Wissenschaftsverlag, Berlin 2010, p. 20; **https://books.google.com/books?id=drnc77mFcEUC&pg=PA20**.

[4] U.S. Court of Appeals, 11th Circuit, Nos. 04-16231 & 05-11303, Scheerer v. U.S. Attorney General, p. 7; **http://caselaw.findlaw.com/us-11th-circuit/1080433.html**.

[5] *Frankfurter Rundschau*, 12/9/1982; from Ingo Müller, "Zeitgeschichte und Strafprozessrecht", *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 92(2) (2009), pp. 193-201, here p. 199; **http://dx.doi.org/10.5771/2193-7869-2009-2-193**.

[6] BGBl I, 1975, No. 3, pp. 129-201, here p. 174; **www.bgbl.de/xaver/bgbl/start.xav?jumpTo=bgbl175s0129.pdf**

[7] See **https://de.wikipedia.org/wiki/Hauptverhandlungsprotokoll**

[8] BGBl I, 1965, No. 54, pp. 1373-1436, here p. 1411; **www.bgbl.de/xaver/bgbl/start.xav?jumpTo=bgbl165s1373.pdf**

[9] **www.gesetze-im-internet.de/gvg/GVG.pdf**

[10] See Uwe Scheffler, “Strafprozeßrecht, quo vadis?”, Goltdammer’s Archiv für Strafrecht 1995, pp. 449-467, here p. 457; **www.rewi.europa-uni.de/de/lehrstuhl/sr/krimirecht/lehrstuhlinhaber/Publikationen/Aufsaetze/Strafprozessrecht_quo_vadis.pdf**

[11] See the points of the related sections in Footnote 5 of Rainer Hamm, “Beweis als Rechtsbegriff und seine revisionsrechtliche Kontrolle”, in: Edda Weßlau, Wolfgang Wohlers (eds.), *Festschrift für Gerhard Fezer*, de Gruyter, Berlin 2008, p. 394; **https://books.google.com/books?id=jx4F5gzoz_YC&pg=PA394&lpg=PA394**

[12] Marc N. Wandt, “Welche Reformen braucht das Strafrecht?”, *Kriminalpolitische Zeitschrift*, 3 (2017), pp. 221-223, here p. 222; **http://kripoz.de/wp-content/uploads/2017/05/wandt-tagungsbericht-petersberger-tage-2017.pdf**.

[13] Eren Basar, Anja Schiemann, „Die StPO-Reform: Großer Wurf oder vertane Chance?“, *Kriminalpolitische Zeitschrift*, 3 (2016), pp. 177-193; **http://kripoz.de/2016/10/15/die-stpo-reform-grosser-wurf-oder-vertane-chance/**

[14] Benedikt Rohrßen, *Von der “Anreizung zum Klassenkampf” zur “Volksverhetzung” (Section 130 StGB)*, de Gruyter, Berlin 2009, p. 12.

[15] *Ibid*., p. 13.

[16] Mike Ulbricht, *Volksverhetzung und das Prinzip der Meinungsfreiheit*, C.F. Müller, Heidelberg 2017, pp. 26f.

[17] On this, see Rohrßen, *op. cit*., pp. 126f.

[18] **http://de.wikimannia.org/130_StGB**

[19] Danielle E. Finck, “Judicial Review: The United States Supreme Court versus the German Constitutional Court”, *Boston College International & Comparative Law Review*, 20(1) (1997), pp. 123-157; **http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1250&context=iclr**

[20] BVerfG, 1 BvR 2150/08, Nov. 4, 2009; vgl. **www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-129.html**

[21] Original foreword to *Animal Farm*; see **http://orwell.ru/library/novels/Animal_Farm/english/efp_go**.

[22] Lévy, Bernard-Henri. “Ein paar Versuche, in Deutschland spazieren zu gehen”, Interview with Josef Fischer, *Frankfurter Allgemeine Zeitung*, 2/18/1999, p. 46.

[23] BGH, ref. 1 StR 193/93, Trial of O.E. Remer.

[24] BGH, ref. 1 StR 193/93, Trial of O.E. Remer.

[25] *Ibid*. For reportage on the finding of common knowledge, see the decision of the OLG Düsseldorf, ref. 2 Ss 155/91 – 52/91 III; BVerfG, ref. 2 BrR 367/92.

[26] Or as the Mannheim District Court put it (erf. 2 KLs 503 Js 17319/01): "even if the named persons confirmed the probative allegations [no self-evidence, but fear of prosecution], the Chamber would not question the self-evidence of the Holocaust […]."

[27] BGH, Az. 5 StR 485/01;see Sigmund P. Martin, *Juristische Schulung*, 11/2002, pp. 1127f.; *Neue Juristische Wochenschrift* 2002, p. 2115, *Neue Strafrechts-Zeitung* 2002, p. 539.

[28] Klaus-Peter Klingelschmidt, "Prozessposse vor dem Ende", *Die tageszeitung*, 9.2.2007, p. 6; **www.taz.de/!318416/**.

[29] Roman Herzog, "Das positive Widerstandsrecht" in: *Festschrift für A. Merkel,* Munich 1970, p. 100; cited from Klaus Peters, *Widerstandsrecht und humanitäre Intervention,* Osnabrücker Rechtswissenschaftliche Abhandlungen, Vol. 61, Carl Heymanns Verlag, Cologne 2005, p. 184 (Dissertation at Universität Osnabrück 2004/2005).

Author(s):	**Germar Rudolf**
Title:	Germany, Country under the Rule of Law: Role Model or Illusion?
Sources:	*Inconvenient History*, Vol. 9, No. 3 (2017)
Dates:	published: 2017-08-27, first posted: 2017-08-27 17:28:14

http://inconvenienthistory.com/9/3/4872